

**BEFORE THE
PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA**

DOCKET NO. 2013-3-E

In the Matter of)	
)	
Annual Review of Base Rates)	DUKE ENERGY CAROLINAS, LLC'S
for Fuel Costs for)	MEMORANDUM IN OPPOSITION TO
Duke Energy Carolinas, LLC)	SOUTH CAROLINA ENERGY USERS'
)	PROPOSAL TO DEFER
)	UNDER-RECOVERY
)	

Introduction

The South Carolina Energy Users Committee ("SCEUC") proposes that once this Commission has made a determination pursuant to 58-27-865(B) as to the amount of fuel costs that Duke Energy Carolinas, LLC ("DEC" or "Company") should recover, the Commission should require the Company to recover that amount over two years instead of one year. The SCEUC deferral proposal was described in the direct and surrebuttal testimony of its witness Kevin O'Donnell. DEC objected at the August 27, 2013 fuel proceeding in this docket to the admission of O'Donnell's testimony on this issue on the ground that S.C. Code Section 58-27-865 (B) does not permit the requirement of cost recovery deferral recommended by O'Donnell, and now submits this memorandum in support of its objection to the testimony and the SCEUC deferral proposal.

S.C. Code Section 58-27-865(B) Prohibits the Deferral Proposed By SCEUC.

Because of the fluctuation of fuel costs and their concurrent impact on the utility rate system, S.C. Code Section 58-27-865 requires the Commission to annually address the recovery

of the cost of fuel used by investor-owned utilities. *Nucor Steel v. S.C. Public Service Com’n*, 310 S.C. 539, 426 S.E.2d 319, 321 (Sup. Ct. 1992). In this year’s annual review of DEC’s fuel costs, SCEUC proposes that the Commission require DEC to spread the recovery of DEC’s fuel costs over a two-year period instead of the one-year recovery period sought by the Company and agreed to in the settlement between the Company and the Office of Regulatory Staff (“ORS”).

S.C. Code Section 58-27-865 (“Fuel Cost Statute”) requires electric utilities to submit to the Commission and ORS estimates of fuel costs for the next twelve-month period. The Commission may hold a public hearing at any time between the twelve-month reviews to determine whether an increase or decrease in the base rate amount designed to recover fuel costs should be granted. The statute specifically provides that

[u]pon conducting public hearings in accordance with law, the commission shall direct each company to place in effect in its base rate an amount ***designed to recover during the succeeding twelve months***, the fuel costs determined by the commission to be appropriate for that time period, ***adjusted for the over-recovery or under-recovery from the preceding twelve-month period***.

S.C. Code § 58-27-865(B)(emphasis added). This provision is mandatory. In addition, it requires a two-step process: (1) the Commission must determine the appropriate fuel cost to be recovered, using a combination of actual and forecasted cost figures adjusted for any over or under-recovery of fuel costs from previous periods; then (2) the Commission “shall” order a rate adjustment designed to recover the fuel costs “over the succeeding twelve months.” SCEUC’s proposal ignores the twelve-month statutory mandate of the Fuel Cost Statute.

The statute itself prohibits implementation of SCEUC’s proposal. “In interpreting this statute it is imperative that the statute be accorded its clear meaning.” *Nucor v. PSC*, 426 S.E.2d at 321-322. The statute requires recovery during the next twelve month period adjusted for over or under-recovery from the prior twelve month period. To implement the adjustment over two

years ignores the twelve-month mandate. Under the plain meaning rule, the Commission cannot change the meaning of a clear and unambiguous statute. “Where the statute’s language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” *SCEUC v. S.C. Public Service Com’n*, 388 S.C. 486, 697 S.E.2d 587, 590 (Sup. Ct. 2010).

The statute does not give the Commission discretion to lengthen the period during which over and under-recoveries are collected. The proposal is not in keeping with the legislative intent in enacting the statute which was to provide a means for electric utilities to make routine, **annual** adjustments in the amount of fuel cost recovered from customers. 2007 S.C. Act 16, Purpose and Findings, Section 1(C) (emphasis added). The Fuel Cost Statute codified Commission procedures that provided a fuel cost recovery mechanism. The Commission itself noted in one of its early orders approving a fuel cost recovery mechanism that “it must be remembered that this clause is intended to pass along with rapidity to the ratepayer decreases in fuel cost, as well as increases.” *Application of Carolina Power & Light Co.*, Docket Nos. 18,361 & 18,387, Order No. 19,526, p. 46.

If the Commission adopted the phased-in approach recommended by SCEUC, it would be setting two sets of rates. The Commission does not have the statutory authority to set two sets of rates in one proceeding. The statute requires the Commission to direct each company to place “an amount” designed to recover fuel costs for the upcoming twelve months. S.C. Code § 58-27-865(B). This statute envisions a twelve month rate cycle, not a twenty-four month period. As a result, this statutory scheme conflicts with SCEUC’s proposal.

A similar issue was presented on an appeal to the Circuit Court of a Commission ruling in a water and sewer rate case. See *Total Environmental Solutions, Inc. v. Foxwood Hills POA et*

al., Order ruling on Appeal of Public Service Commission Decisions, Richland County Circuit Court, Case Number 05-CP-40-0986, dated September 27, 2005 (“TESI Order”). In the TESI case, the Commission adopted a phased-in approach for new water and sewer rates over a two year period in three installments. On appeal the Circuit Court held that allowing the Commission to establish three operating margins and three sets of rates would be inconsistent with the General Assembly’s mandate to set just and reasonable rates within the statutory twelve month rate cycle. The Court held that the Commission erred by not setting one operating margin and one set of rates that would allow TESI a fair rate of return at the point in time when the new rates go into effect. “In light of its statutory authority to set rates, the Commission cannot rely on a phased-in approach to balance the interests of the company and the public.” TESI Order, p. 7-9. Applying the *Tesi* analysis to the SCEUC proposal, it is clear that DEC fuel related rates for year two should be based on subsequent Fuel Cost Statute proceedings, not based on the second half of phased-in costs from the prior year. The statute clearly provides for a true-up for over and under-recovery on an annual basis.

In support of its request that the Commission order a deferral of the recovery of the fuel costs, SCEUC witness O’Donnell cited language from paragraph 5 of a settlement agreement in Docket No. 2011-2-E, which was the SCE&G fuel cost proceeding from 2011. Tr. pp. 254-255. The deferral in that case does not provide any guidance with respect to the issue presented in this proceeding. In the present case there is a settlement agreement between the Company and ORS that provides for recovery of fuel costs over the twelve month period prescribed by S.C. Code Section 58-27-865(B). SCEUC seeks an order requiring recovery to be extended over twenty-four months. In Docket No. 2011-2-E SCE&G agreed to a deferral as part of a comprehensive settlement, and no legal issue was presented to the Commission as to whether the two year

recovery was consistent with the statute. Accordingly, the SCE&G settlement has no precedential value on the question presented here.

O'Donnell also argued that the Commission could order the deferral pursuant to its authority under S.C. Code Section 58-27-865(G) to promulgate regulations relating to the recovery of fuel costs. Tr. p. 255. In the first place, this suggestion provides no basis for a deferral order in this proceeding since the Commission has not promulgated any such regulation and could not in time to affect this case. See S.C. Code Sections 1-23-10 *et seq.* (Provisions of the Administrative Procedures Act governing the process for rule making proceedings.) In addition, it is fundamental that the Commission could not promulgate a regulation that conflicted with a statutory provision. See *Brown v. South Carolina Department of Health and Environmental Control*, 348 S.C. 507, 560 S.E.2d 410 (Sup.Ct. 2002); *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 581 S.E.2d 836 (Sup. Ct. 2003). Because S.C. Code Section 58-27-865(B) requires fuel costs to be recovered over “the succeeding twelve months,” the Commission would not be able to promulgate a regulation that provided for a different time period.

Additionally, the same general principle that prohibits retroactive ratemaking also applies to the SCEUC proposed phase-in of the DEC’s under-recovered fuel cost in the second year. “[T]hose customers who use the service provided by the utility should pay for its production rather than requiring future rate payers to pay for past use.” *Porter v. S.C. PSC*, 328 S.C. 222, 493 S.E.2d 92, 97 (Sup. Ct. 1997). Spreading the fuel costs over two years makes it more likely that customers who did not benefit from the fuel expenditures would be required to pay for them.

Conclusion

The SCEUC proposal for the Commission to require delay or deferral of the recovery of DEC’s fuel costs over two years conflicts with the clear provisions of S.C. Code Section 58-27-

865(B). The statute requires that the fuel costs determined to be recoverable be recovered over a twelve-month period, and as a result, it prohibits SCEUC's proposal. The twelve-month period is the recovery period agreed to in the settlement between ORS and DEC, it is the period prescribed by the S.C. Code. Section 58-27-865(B), and it should be adopted by this Commission.

Dated this 16th day of September, 2013.

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